

**Appendix A: NOAA Findings of Preliminary
Approvability June 27, 2005**



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

JUN 27 2005

Mr. Thomas E. Irwin, Commissioner
Alaska Department of Natural Resources
550 West 7th Avenue, Suite 1400
Anchorage, Alaska 99501-3650

Dear Commissioner Irwin:

Thank you for submitting the Alaska Department of Natural Resources' (DNR's) revised Alaska Coastal Management Program (ACMP) amendment. The Office of Ocean and Coastal Resource Management (OCRM) received the amendment materials on June 2, 2005. DNR's submission, as identified on the ACMP web site, includes: June 2, 2005, cover letter; June 2 ACMP Document; AS 46.39 and 46.40; 11 AAC 110, 112, and 114; the "ABC List;" HB 69, 86 and 191; SB 102; and the "Federal Requirement Matrix."

PRELIMINARY APPROVAL DECISION

OCRM has evaluated these documents in accordance with Coastal Zone Management Act (CZMA) requirements and the written correspondence between our offices. Pursuant to CZMA section 306(e)(3)(B) (16 U.S.C. § 1455(e)(3)(B)) and 15 C.F.R. § 923.82, OCRM finds that Alaska has satisfied the procedural requirements of CZMA section 306(d) and that Alaska is likely to satisfy the applicable program approval standards of CZMA section 306(d). Therefore, based on the findings below, OCRM issues this preliminary approval permitting Alaska to expend CZMA funds to implement the proposed amendment for a period not to exceed six months, beginning on July 1, 2005.

PRELIMINARY APPROVAL FINDINGS

OCRM's letter dated June 28, 2004, described the specific CZMA requirements for the ACMP amendment. These CZMA requirements are found at 16 U.S.C. §§ 1455(d) and 1455(e), 15 C.F.R. part 923, and OCRM's Program Change Guidance (July 1996). Upon receipt of Alaska's October 5, 2004, ACMP amendment submission, OCRM's October 8, 2004, letter began the formal amendment process and also determined the October 5 submission was not complete. OCRM's November 4, 2004, letter then provided more detailed comments on the October 5 submission and CZMA requirements. Subsequently, DNR submitted the December 17, 2004 ACMP Document.

After several discussions between OCRM and DNR, OCRM provided detailed comments on remaining CZMA approvability areas by letter dated January 28, 2005. These areas were discussed again in OCRM's letters of March 3 and March 25, 2005, and in several responses by



DNR and Governor Murkowski. These discussions culminated in the April 14, 2005, letter from Dr. Richard Spinrad, Assistant Administrator, National Oceanic and Atmospheric Administration (NOAA) Ocean Service, to Commissioner Irwin. Dr. Spinrad's April 14 letter confirmed the remaining items, as agreed to by telephone conference, Alaska needed to address in order for OCRM to make a preliminary approval decision. These items, and OCRM's preliminary approval findings for each, are described below.

1. **PUBLIC HEARING.** OCRM finds that Alaska satisfied the requirement to hold a public hearing on the ACMP submission to NOAA prior to a preliminary approval decision, pursuant to 16 U.S.C. § 1455(d)(4) and 15 C.F.R. §§ 923.81(a) and 923.82(a). This hearing was held on May 20, 2005, in Anchorage and was simulcast to all 22 Legislative Information Offices around the State. Oral and written testimony was allowed. All information regarding the public hearing and all comments were submitted to OCRM. *See* June 2 ACMP Document, pp. 163-164. This public hearing was in addition to the opportunities provided by Alaska for public input on development of the ACMP amendment. *See* June 2 ACMP Document, Chapter 8, pp. 157-177. All public comments submitted to OCRM are part of OCRM's record for a final decision on the amendment.

2. **APPLICATION OF ENFORCEABLE POLICES TO FEDERAL LANDS AND GEOGRAPHIC LOCATION DESCRIPTIONS.** OCRM finds that Alaska's description of the CZMA federal consistency "effects test" has been accurately described in the June 2 ACMP Document at: pp. 15-17; section 5.3.9 (pp. 93-95); and sections 5.4 and 5.5 (pp. 106-108). This will ensure that federal agencies provide DNR with a consistency determination for an activity, regardless of location, if the federal agency determines there will be effects to coastal uses or resources. Alaska may use the various provisions in NOAA's regulations to reach agreements with federal agencies regarding when and how federal consistency will apply to federal agency activities under 15 C.F.R. part 930, subpart C (e.g., general concurrences, de minimis activities, beneficial activities). Federal license or permit activities will be subject to DNR federal consistency review pursuant to the listed, unlisted and geographic location description requirements in 15 C.F.R. §§ 930.53 and 930.54.

3. **APPLICATION OF DISTRICT POLICIES AND DESIGNATED AREAS.** OCRM finds that Alaska's regulatory change adequately applies the CZMA federal consistency effects test. *See* 11 AAC 110.015 and the June 2 ACMP Document, section 5.4 and 5.5 (pp. 106-108). This new section, 11 AAC 110.015, will apply federally approved State and District ACMP enforceable policies to federal actions affecting Alaska's coastal uses or resources, regardless of the location of the federal action or where a coastal use or resource is affected. This provision, 11 AAC 110.015, shall apply notwithstanding language limiting the application of District policies to geographic areas in other sections. DNR's application of 11 AAC 110.015 through federal consistency reviews may be modified by any agreements DNR makes with federal agencies pursuant to 15 C.F.R. part 930, subpart C, and by the listed, unlisted and geographic location description requirements in 15 C.F.R. §§ 930.53 and 930.54, for federal license or permit activities.

4. **TECHNIQUE A.** OCRM finds that Alaska's change to 11 AAC 112.270, Subsistence, meets the remaining requirements of 15 C.F.R. § 923.42 (Technique A – local implementation criteria). Technique A is meant to apply state enforceability to an entire local government plan. While Alaska still has Technique A components, OCRM finds that the ACMP is relying primarily on 15 C.F.R. § 923.43 (Technique B – direct State implementation criteria) for implementation of State standards and that the only State standard presently reliant on District policies is the subsistence use policy. All other District policies are at the choice of the Districts and are not required for ACMP approval or to implement State standards. Therefore, 11 AAC 112.270, as modified, gives Alaska the ability to designate subsistence use areas and enforce the subsistence use standard during District plan development, pursuant to 15 C.F.R. § 923.42(b)(2), and would use 15 C.F.R. § 923.42(b)(3)(i) for direct State enforcement of the subsistence use standard if a District failed to adopt a plan.

5. **SCOPE AND CONTENT OF DISTRICT PLANS.** OCRM finds that the June 2 ACMP Document more clearly describes the roles and responsibilities of Districts. Section 5.3 (pp. 68-106) and section 5.4 (pp. 106-108), combine separate guidance documents previously provided to Districts and OCRM. The new section 5.3 and 5.4 is likely to satisfy the need for clarity pursuant to 15 C.F.R. § 923.3(e)(1) and (2), sufficient to guide District plan development and implementation.

6. **HABITATS POLICY.** The CZMA requires State programs to develop and maintain a management program sufficient to protect coastal resources such as shorelands, wetlands, estuaries, floodplains, fish and wildlife and their habitat and to use the land and water resources of the coastal zone giving full consideration to the ecological values of those resources as well as the need for compatible economic development. Further, the CZMA requires the management program to contain specific, comprehensive and enforceable policies to provide that protection and overarching management scheme. *See* 16 U.S.C. § 1455(d)(1); 15 C.F.R. §§ 923.1, 923.3., 923.10 and 923.11. OCRM finds that the habitat management components described in the June 2 ACMP Document, sections 5.2.10 (pp. 62-64) and 5.3.8.10 (pp. 85-89), and 11 AAC sections 112.300 and 114.250(h) are sufficiently comprehensive for purposes of our preliminary approval decision.

OCRMs preliminary approval finding for the Habitats policy is also based on changes to 11 AAC 112.300(c)(1)(B)(ii) and 11 AAC 114.250(h)(2), where DNR replaced the phrase “significantly more productive” with the phrase “biologically and significantly productive.” These changes remove the prior ACMP directive to compare adjacent habitats. While OCRM finds the new phrase sufficient for preliminary approval, OCRM continues to believe that “significantly productive” is not a term generally accepted in the scientific community. OCRM recommends that Alaska provide a definition so that users, Districts, and other affected interests would be on notice as to how “productivity” is being measured and can provide the relevant information.

ADDITIONAL FINDINGS AND NEXT STEPS RELATED TO FINAL APPROVAL

As noted in NOAA's April 14, 2005, letter there were numerous editorial and clarification items identified in OCRM's January 28, 2005, letter that did not need to be made for OCRM's preliminary approval decision. Rather, those items need to be made before final approval of the ACMP document. OCRM understands that DNR has sought to address these editorial and clarification items in its June 2 ACMP Document. *See* DNR's June 2, 2005, letter. OCRM appreciates this effort by DNR. In the coming weeks OCRM will determine if the June 2 ACMP Document sufficiently addresses these items. If OCRM believes that further changes are needed to the June 2 ACMP Document to address the editorial and clarification items described in OCRM's January 28 letter, OCRM will first discuss these items with DNR before determining whether any remaining items must be made to the ACMP Document.

OCRM takes note of SB 102, described in the June 2 ACMP Document in section 10.2.3 (pp. 202-204). SB 102 does not impact OCRM's ability to issue this preliminary approval and does not appear to contain provisions affecting our final approval decision. SB 102 was enacted during Alaska's 2005 legislative session and makes several amendments to HB 191 and establishes a repeal of the ACMP on July 1, 2011, unless the Alaska legislature amends the repeal provision. OCRM understands that this "sunset" provision was added to provide the Alaska legislature with a mandatory review of the effectiveness of the ACMP. In addition, SB 102 also requires that if OCRM has not approved the ACMP amendment by January 1, 2006, the ACMP would sunset on May 10, 2006.

The CZMA is a voluntary program and States may withdraw from the program. Therefore, the sunset provisions do not affect our preliminary or final decision. If the sunset provisions were to take effect, OCRM would, however, have to make adjustments in any remaining CZMA grant funds awarded to Alaska.

SB 102 also extends the date on which the current State ACMP standards (6 AAC 80.010 – 6 AAC 80.900) and District plan requirements (6 AAC 85.020 – 6 AAC 85.900) apply, pending OCRM's final approval of the ACMP amendment. This date was extended from July 1, 2005, to March 1, 2006. This will ensure that Alaska has State standards for federal consistency reviews pending OCRM's final approval decision. SB 102 also extended the date on which existing District plans would sunset from July 1, 2006, until March 1, 2007, and extends the date for submission of new District plans to March 1, 2006.

OCRM will coordinate National Environmental Policy Act (NEPA) scoping meetings with DNR and expects to complete NEPA compliance and issue a final decision on the ACMP amendment by December 31, 2005.

This is an important milestone and OCRM extends its appreciation to those in the State who have diligently worked on the ACMP. We look forward to a coordinated and collaborative process to complete the ACMP amendment.

Sincerely,



Eldon Hout
Director

cc: Honorable Senator Ted Stevens
Honorable Senator Lisa Murkowski
Honorable Congressman Don Young
Office of the Governor, ATTN: Chief of Staff
Office of the Governor, ATTN: Washington, D.C. Office Director
Bill Jeffress, Director, DNR-OPMP